Nos. 07-1262, 07-1313, 07-1314

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEAN TRANSPORTATION, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

GRAND RAPIDS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

Intervenor

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

DEAN TRANSPORTATION EMPLOYEES UNION

Respondent

ON PETITION FOR REVIEW, CROSS-APPLICATION FOR ENFORCEMENT, AND APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEAN TRANSPORTATION, INC.	*	
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Petitioner/Cross-Respondent	*	Nos. 07-1262, 07-1313,
	*	07- 1314
	*	
v.	*	
	*	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	*	07-CA-49003 &
	*	07-CB- 15014
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
GRAND RAPIDS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION	*	
	*	
	*	
Intervenor	*	
	*	
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	
v.	*	
	*	
DEAN TRANSPORTATION EMPLOYEES UNION	*	
	*	
	*	
Respondent	*	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court's Rules, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

Dean Transportation, Inc. ("the Company") was a respondent before the Board, and is the petitioner/cross-respondent herein. Dean Transportation Employees Union ("DTEU") was also a respondent before the Board, and is a respondent herein. The Board is the respondent/cross-petitioner herein, and petitioner against DTEU herein; the Board's General Counsel was a party before the Board. The Grand Rapids Educational Support Personnel Association ("GRESPA"), was the charging party before the Board. GRESPA is also the intervenor herein, in support of the Board.

The *amici* herein are: National School Boards Association, Kent Intermediate School District, National School Transportation Association, Michigan Chamber of Commerce, and Mackinac Center for Public Policy, in support of the Company.

B. Rulings Under Review

The ruling under review is a decision and order of the Board (Chairman Battista and Members Liebman and Kirsanow), *Dean Transportation, Inc. and Grand Rapids Education Support Personnel Association, Michigan Education Association, and Dean Transportation Employees Union and Grand Rapids Education Support Personnel Association, Michigan Education Association*, Cases

7-CA-49003 and 7-CB-15014, issued on June 21, 2007, and reported at 350 NLRB No. 4, 2007 WL 1832184.

C. Related Cases

The case under review was not previously before this Court or any other court. Board Counsel are unaware of any related cases either pending in this Court or any other court.

_____

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Dated at Washington, DC
this 24th day of July 2008

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GLOSSARY

"Company"	**Dean Transportation, Inc.**
"DTEU"	**Dean Transportation Employees Union**
"GRPS"	**Grand Rapids Public Schools**
"GRESPA"	**Grand Rapids Educational Support Personnel Association**
"KISD"	**Kent Intermediate School District**
"the Board"	**National Labor Relations Board**
"Br"	**Company Brief**
"A Br"	**Amici's Brief**

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AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the petition of Dean Transportation, Inc. ("the Company"), to review a final order of the National Labor Relations Board ("the Board"). The Board filed a cross-application for enforcement of its Order, and Grand Rapids Educational Support Personnel Association ("GRESPA"), the Charging Party before the Board, intervened on behalf of the Board. The Board also filed an application for enforcement of its Order against Dean Transportation Employees Union ("DTEU").

The Board had jurisdiction below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices. This Court has appellate jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Decision and Order issued on June 21, 2007, and is reported at 350 NLRB No. 4. (A 1471 - 1486.)[1] The Company filed its petition for review on July 10, 2007, and the Board filed its cross-application for enforcement on August 7, 2007.

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[1] Record references in this final brief are to the Joint Appendix (A __.) following original record. When a reference contains a semicolon, references preceding it are to findings of the Board. References following the semicolon are to the supporting evidence.

The Board also filed its application for enforcement against DTEU on August 7, 2007, and this Court consolidated all three cases on September 19, 2007. All filings were timely; the Act places no time limits on petitioning to review or applying to enforce Board orders. The Board's Order is a final order with respect to all parties.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with GRESPA. Resolution of that question turns on two subsidiary issues:

A. Whether substantial evidence supports the Board's finding that the Company became a successor employer to the Grand Rapids Public Schools ("GRPS") when it acquired GRPS's 900 Union Street location and hired a majority of its employees from GRPS's workforce, and continued operating 900 Union Street in essentially the same way as it had been operated under GRPS.

B. Whether the Board acted within its broad discretion when it determined that a bargaining unit of historically represented, former GRPS employees at 900 Union Street, consisting of bus drivers, route planners, and mechanics, constituted an appropriate, single-facility unit at the Company.

2. Whether the Board properly found, based on the above findings, that the Company violated Section 8(a)(1), (2), and (3) of the Act, and DTEU violated Section 8(b)(1)(A) and (2) of the Act, by the Company recognizing and DTEU accepting recognition as representative of the bus drivers at 900 Union Street, by the Company and DTEU applying their collective-bargaining agreement to the bus

drivers at 900 Union Street, and by the Company deducting and DTEU accepting dues and agency fees from these employees.

3. Whether the Board properly made the independent finding that the Company violated Section 8(a)(1), (2), and (3) of the Act, and the Union violated Section 8(b)(1)(A) and (2) of the Act, as stated above, because the bus drivers at 900 Union Street were not properly accreted to the existing DTEU unit and an uncoerced majority of those employees had not designated DTEU as their representative.

4. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by telling the 900 Union Street bus drivers that they were required to become members of DTEU and to sign union checkoff authorizations as a condition of employment.

APPLICABLE STATUTES

The Company included some applicable statues in its brief. The remaining applicable statutes are in this brief's appendix.

STATEMENT OF THE CASE

This unfair labor practice case arose out of the Company's refusal to recognize and bargain with GRESPA when the Company acquired 900 Union Street, a transportation depot of bus drivers, mechanics, and route planners who had formerly worked for GRPS. The Company subsequently recognized another union, DTEU, as representative of the former GRESPA-represented bus drivers. DTEU accepted this recognition and the Company and DTEU then applied DTEU's collective-bargaining agreement to these former GRESPA-represented employees, including the deduction and acceptance of dues from these employees' paychecks. The Company also told these employees that they were required to become members of DTEU and to sign DTEU checkoff authorizations.

Based upon a charge filed by GRESPA, the Board's General Counsel issued a complaint against the Company and DTEU alleging that they had committed several unfair labor practices by engaging in the above actions. (A 672, 673.) Following a hearing, an administrative law judge found merit to the General Counsel's allegations and issued a decision and recommended order (A 1472-1486), to which the Company and DTEU excepted. The Board issued a decision

affirming the judge's findings and adopting his recommended order, with slight modifications. (A 1471-1472.) The Board's findings of fact are set forth below; its conclusions and order are summarized thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. GRPS, Its Employees, and GRESPA

GRPS is a large, urban school district in Michigan serving more than 22,000 students in about 100 schools. (A 1474; A 26.) GRESPA represents GRPS employees in a variety of job classifications. (A 1474; A 122-123.)

On June 3, 1993, the Michigan Employment Relations Commission ("MERC") certified GRESPA as the exclusive collective-bargaining representative of the following district-wide unit of GRPS's employees:

> All non-supervisory employees in operations, supply, transportation, food service and maintenance, excluding all temporary (less than (30) days) employees, supervisors, management supportive service staff and all other employees.

(A 1474; A 348, 356; 824.) Since that time, GRESPA and GRPS have entered into a series of collective-bargaining agreements establishing the wages, hours, and other terms and conditions of employment for this unit, the most recent of which was effective for the period July 1, 2004 through June 30, 2006. (A 1474; A 123, Tr 351, 137.)[2]

[2] GRESPA is an affiliate of the Michigan Education Association ("MEA"), which in turn is an affiliate of the National Education Association.

The above unit of non-teaching, non-clerical employees included the bus drivers, mechanics, and "dispatcher/route planners" who worked in the transportation department at 900 Union Street in Grand Rapids, Michigan. (A 1474; A 24-25, 137, 348-349, 363, 759-764.)[3]

B. Kent Integrated School District; Its Four Regions, Including GRPS; Its Special Education Transportation Contracts with the Company; and Its 2002 Contract with GRPS

Kent Integrated School District ("KISD") is a county-wide school district, broken down into four regions, that provides educational services to students with special needs. (A 1474; 668.) Regions I, II, and III of the KISD are comprised of a number of smaller school districts within Kent County, Michigan. (*Id*.) GRPS, which is the largest school district within KISD, is the only school district in Region IV, and most of its special education students attend programs within the geographic boundaries of GRPS. (*Id*.)[4]

At all relevant times, KISD had separate agreements for the transportation of special education students with individual school districts in Regions I and II, whose bus drivers were represented by Kent County Education Association. (A

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[3] In 2005, a separate classification of "dispatchers" employed in the transportation department, which had been included in this unit until about 2003, became represented by another affiliate of the MEA. (A 1474, n.7; A 132, 181, 348.)

[4] GRPS also operates several programs on the Lincoln School campus outside the city of Grand Rapids that serves students from GRPS as well as other districts within the county. (A 1474; A 17-18, 88, 93.)

1474; A 272-273.) In 2000, KISD contracted with a private entity, Dean Transportation, Inc. ("the Company"), which specializes in special education transportation, to transport special education students in Region III. (A 1475; A 264-266, 511.) This contract established Region III as the Company's "Special Education Transportation Consortium" ("Consortium"). (*Id*.)

In July 2002, KISD contracted with GRPS and GRESPA—whose drivers provided transportation for both regular and special education students—to jointly employ the 97 GRPS drivers who transported special education students in Region IV. (A 1474; A 445.) GRESPA remained the bargaining agent for these employees. (*Id*.)

C. The GRPS Transportation Department at 900 Union Street

During the 2004–2005 school year, GRPS employed more than 4000 people, of whom 536 were in the GRESPA bargaining unit. (A 1474; A 17, 26-27, 338, 765.) Of these, approximately 168 worked in the transportation department located at 900 Union Street in the city of Grand Rapids, including bus drivers, route planners, and mechanics. (*Id*.) The five dispatchers and one payroll clerk there were represented separately. *See* n.3.

1. The Physical Layout and Employee Locations

The GRPS transportation department contained several buildings and a parking lot. (A 1474; A 17, 126-129, 798.) The main building housed the main transportation department office and the offices of several other GRPS departments, such as grounds maintenance. (*Id*.)

The main office of the transportation department was located on the first floor of the building, in the back, with a separate entrance from the parking lot. (A 1474; A 129, 799.) Transportation Director Don Sinke had an office there, and 900 Union Street's two supervisors, Margaret Kangas and Veronica Lowe, had cubicles. (A 1474-1475; No 9, 131, 799.)

The premises also contained a building housing the drivers' lounge and parts storage for the transportation department, and a garage where the unit mechanics repaired and maintained the school buses. (A 1474; A 126-129, 798.) The bus drivers parked the buses in the parking lot when they were not transporting students, and gassed up the buses in the lot before taking them out on the road. (A 1474; A 129, 798.)

The bus drivers reported to the office every morning to punch in and retrieve mail or messages from their mailboxes located in the office. (A 1475; A 145.) From there, they went to their assigned bus, performed an inspection, gassed up the bus, and went on their way. (A 1475; A 146-147.) At the end of their day, they

returned to the office to punch out. (A 1475; A 151.) In between routes, the drivers waited in the drivers' lounge or, while off the clock, left the facility and returned for their afternoon runs. (A 1475; A 127.)

The route planners worked in a separate room within the transportation department. (A 1475; A 133, 799.) A conference room adjacent to the route planners work area served as their breakroom. (A 1475; A 799.)

The mechanics, who worked in the garage on the premises, occasionally went into the office or the drivers' lounge, where the parts room was located. (A 1475; A 798.) They had their own area within the garage to take breaks and eat lunch. (*Id*.)

2. The Duties of GRPS Supervisors; Working Conditions of GRESPA Employees in the Transportation Department; Interaction Among GRPS Transportation Employees

a. Duties of GRPS Supervisors

Transportation Director Sinke and supervisors Kangas and Lowe were responsible for the day-to-day running of 900 Union Street. (A 1474, 1475; A 68, 70-71, 83.) Their duties included supervising, scheduling and approving leave, and disciplining the drivers, route planners, and mechanics. (*Id*.)

b. Working Conditions of GRPS Bus Drivers

Bus drivers transported GRPS middle school, elementary school, and special education students to the schools within the District. (A 1474; A 761, 762.) While

driving the buses, the drivers communicated with the dispatchers at the office via radio. (A 1475; A 155.) The drivers also interacted with the dispatchers when they came to the office in the mornings and afternoons, and had regular contact with the payroll clerk on payroll issues. (*Id*.) In addition, the drivers interacted with the route planners and mechanics, as described below.

c. Working Conditions of GRPS Route Planners

The three route planners employed by GRPS in 2004–2005 created both regular and special education bus routes, using a computer program called *Versa Trans* to create and adjust the drivers' routes based on school census reports showing where students lived. (A 1475; A 77. 84, 116.) Supervisor Kangas compiled the routes created by the route planners into "runs," which she assigned to the drivers on the basis of seniority. (A 1471, n.3, 1475; 77, 84, 116).

The route planners, who were paid an hourly wage and punched a time clock, typically were promoted from the ranks of bus drivers and were required to maintain their commercial driver's license to fill in for drivers as needed. (A 1475; A 178, 763.) The route planners got feedback from the drivers during the course of the year regarding how the routes worked in practice. (A 1475; 145.) Drivers sought adjustments if there were problems with the routes. (*Id*.) Occasionally, the route planners filled in for the dispatchers. (A 1475; 179.)

d. Working Conditions of GRPS Mechanics

GRPS also employed a lead mechanic and seven mechanics who worked in the garage performing scheduled maintenance and repairs. (A 1475; A 764, 349.) The mechanics reported to Kangas and Sinke. (A 1475; A 65, 68-70.) They frequently interacted with the drivers who communicated with them by radio if they had bus problems on their routes, and through regular discussions at 900 Union Street regarding the condition of their buses and the need for maintenance or repair. (A 1475; A 146, 154-156, 168.)

D. GRPS Outsources Its Transportation Services to the Company; Contract Provisions Preserve Working Conditions of Former GRPS Employees and Differ from Other Company Contracts

At an April 18, 2005 meeting of its Board of Education, GRPS approved a resolution to outsource all of its student transportation services to the Company. (A 1475; A 350, 450-462.) Soon thereafter, GRPS formally accepted the proposal. (*Id*.) GRPS then authorized staff to enter into a contract with the Company for the upcoming school year and effective June 9—the last day of the 2005 school year—to permanently lay off the GRPS transportation department employees. (A 1475; A 350, 466.)

Two contracts between GRPS and the Company effectuated this decision. (A 1475; A 476, 511.) One contract covered the transportation of elementary and middle school students. (A 1475; A 476.) This contract was the first contract that

the Company had with a significant component of regular education—as opposed to solely special education—drivers. (A 1475; A 347.)

The second contract, which included KISD as a party, was a 5-year extension of the 2000 Consortium agreement between the Company and KISD covering special education student transportation in the six school districts in Region III of KISD. (A 1475; A 511.) The contract added GRPS—Region IV—to the Consortium for special education student transportation. (*Id*.)

Both contracts included provisions for the Company to use its best efforts to maintain existing routes within GRPS for the first year, and to offer incentives, referred to as transition bonuses, to encourage GRPS drivers to apply for company jobs. (A 1475; A 510, 523.) The goal of the parties' agreements was for the Company to maintain continuity in the transportation services it provided to GRPS students. (A 1475; 56-59, 296.) The Company also agreed to lease GRPS's transportation facility, including the transportation offices, bus yards, drivers' lounge, and maintenance facility, and to purchase the existing buses from GRPS and KISD. (A 1476; 351, A 568, 574, 583.)

Although the contract for the transportation of GRPS special education students was an extension of the Consortium contract that the Company already had with school districts in KISD's Region III, GRPS secured special provisions in the agreement. (A 1475; A 299-300, 517, 519, 520-522, 528, 531, 534, 535, 548,

553.) These provisions treated the transportation needs of GRPS's special education students differently than the other school districts. (*Id*.) Specifically, the contract contained special terms with respect to route planning, driving, maintenance, employee compensation, and the Company's compensation rates. (*Id*.) For example, the Company was required to use GRPS's existing *Versa Trans* software for route planning and to adhere to GRPS's administration directives. (A 489, A 531.) Both the regular education and special education contracts gave the GRPS Superintendent the right of final approval for any route changes. (*Id*.) In addition, both contracts required the Company's mechanics to continue to use GRPS maintenance software. (*Id*.)

E. The Company: Its Structure and Locations; Its Recognition of DTEU at Its Locations

The Company has its headquarters in Lansing. (A 1479; A 252-257.) It is administratively divided into the Central Michigan and West Michigan Regions. (*Id*.) Brenda Witteveen is the West Regional Manager, and 900 Union Street falls within the West Region. (*Id*.)

Company President Kellie Dean's office is in Lansing, as are the offices of Vice President and Business Manager Brian Thrasher and Fleet Services Manager Scott Pellerito. (A 1480; A 254-257.) The Company's Operations Department, Financial Services, and Human Resources Department are also in Lansing. (*Id*.)

All other company locations are geographically removed from 900 Union Street: the Alma office is 80.63 miles away, the Clinton office is 74.88 miles away, the Kent Region III office (36th Street) is 8.02 miles away, the Lansing office is 73.62 miles away, the Mt. Pleasant office is 84.65 miles away, the Ottawa (Holland) office is 32.33 miles away, and the Eaton office is 60.32 miles away. (A 1479; A 660.) Each of these company locations performs specific services for particular customers unique to each location. (*Id.*)

At each of the above facilities where the Company employs bus drivers, it recognizes DTEU, which was certified by MERC in 1976 to represent the Company's drivers. (A 1472; 1479; A 1181.) The most recent DTEU collective-bargaining agreement became effective on July 1, 2001 and expired on June 20, 2006. (A 599.) As of April 2005, there were 550 company drivers in the DTEU unit. (A 1479; Br 7.) Route planners and mechanics employed by the Company at its various facilities were not represented by a union.

F. The Company Meets with the GRPS Bus Drivers to Announce the Outsourcing from GRPS to the Company

On April 20, 2005, Company President Dean met with the bus drivers employed by GRPS in the drivers' lounge at 900 Union Street to inform them of the decision to subcontract transportation services to the Company. (A 1475; A 55.) Company Human Resources Director Troy Scott and GRPS Transportation Director Sinke also attended. (A 1475; A 55.)

During the meeting, the Company passed out a document entitled, "Driver's Transition Outline." (A 1475; A 350, 463.) This document provided information regarding the Company, its hiring and transition process, and its compensation package. (A 1475; A 463.) Among other things, the document indicated that drivers who submitted applications to the Company by April 29 would be given credit for their GRPS district seniority for pay and job bidding purposes, and would be eligible for incentive pay. (*Id*.) The document also stated:

> [The Company's] desire and intent is to retain existing district employees [who meet transfer contingencies] and its union contract includes conversion provisions that protect such employees who transfer to [the Company] by recognizing their original school district seniority for pay and benefit purposes.

(*Id*.)

At the meeting, President Dean responded to questions from employees. (A 1475; A 55.) In response to a question from a driver, Dean said that GRPS would be paying the incentive bonus. (A 1476; Tr 158-59.) One of the drivers asked if Dean had a union. (A 1476; A 55-56; Tr 158-59.) Dean replied that there was a union, called DTEU, and that the drivers hired by the Company to work under the GRPS contract would be in that union. (*Id*.) Another driver asked what the union dues would be and Dean replied, "$10 a year." (*Id*.) Dean also told the drivers that they would have a contract with a grievance procedure affording them the same rights they had as GRESPA members. (*Id*.)

Dean continued by telling the drivers that he hoped to have 150 signed up by April 29, and that he expected to ultimately employ 160–170 drivers. (A 1476; A 57.) He also told the drivers that it was his hope and desire that all of the Company's drivers would be former GRPS drivers. (A 1476; A 57.)

Another driver asked if the Grandville drivers[5] would be able to bid into their positions. Dean responded, "No. You will be your own local. They will not be able to bid into your position." (A 1476; A 56-57.) In response to another question, Dean denied that the Company would be hiring extra drivers to break up their routes. He said that he intended to put the fewest buses on the road and to have the fewest drivers do the work. (A 1476; A 58-59, Tr 161-62.)

Dean also told the drivers that the Company would continue to use *Versa Trans* software for route planning, that Sinke would continue to serve as transportation director to ensure continuity, and that the Company was going to keep the buses they were currently driving, although the Company also planned to purchase additional buses. (A 1476; A 56-59; Tr 159-62.) Dean assured the drivers that "Grand Rapids work would stay with Grand Rapids drivers." (A 1476; A 57, Tr 160.) He concluded by telling the drivers that Human Resources Director Scott would return the next day

[5] "Grandville" referred to KISD drivers employed by the Company to transport special education students in KISD Region III, which was based at the garage on 36th Street, 8 miles away from 900 Union Street. (A 1476, n.10; A 56-57.)

with applications and information about DTEU and that Scott would get them all signed up. (A 1476; A 58-59.)

On April 21, the Company sent the drivers a letter, thanking them for attending the meeting and encouraging them to apply by the April 29 deadline. (A 1476; A 465.) The letter assured the drivers that they could still apply after April 29, but stated that they would not then be eligible for the transition bonus or seniority credit. (*Id*.)

G. Job Application Process for Former GRPS Employees; Union Dues Checkoff Discussed

GRPS employees subsequently submitted job applications. For example, on June 1, driver Judy Wilson met with West Regional Manager Witteveen in the GRPS main office at 900 Union Street. (A 1479; A 148-149.) A woman named Sharon, who had been hired by the Company to work as a receptionist at 900 Union Street, was there assisting with the paperwork. Besides Wilson, about 10 other drivers came to sign papers that day. (*Id*.)

A dues checkoff authorization for the DTEU was included in the stack of forms for the employees to complete. (A 1476; A 590.) When Wilson asked what the form was, Sharon told her it was a union paper and that she had to sign it to work there. (A 1476; A 148-149.) Sharon told her it cost $10 a year and that she would be part of the DTEU. (*Id*.) The form stated that, upon completion of a 90-day probationary employment, the employees were required to become members of DTEU or pay a service fee to the union "in an amount determined by [DTEU] in

accordance with applicable law." (A 1476; A 590.) The form also authorized the payroll deduction of the union dues or service fee in the first payroll period in the month of December. (*Id*.) Wilson then signed the form. (A 1476; A 148-149, 800.)

H. The Company Hires Most of GRPS's Transportation Employees and Maintains the GRPS Transportation Department in Substantially the Same Way as It Had Previously Operated, with Employees Doing Substantially the Same Work

On June 9, GRPS permanently laid off its transportation department employees. (A 1476; A 352.) Effective June 10, the Company began providing transportation services for regular and special education students in GRPS, including the maintenance and repair of buses and route planning and dispatch operations. (A 1476; A 352.) The Company continued using the GRPS 900 Union Street facilities to run these services. (A 1476; A 352.)

1. Post-Transition Duties: Supervisors at 900 Union Street

After the Company took over, Transportation Director Sinke and Supervisor Kangas continued in the same positions at Union Street, Sinke as Transportation Director and Kangas as a transportation supervisor,[6] although they reported to the Company's West Regional Manager, Witteveen. (A 1476; A 65, 70, 78, 150, 352.)

[6] The Company also hired one of the former GRPS route planners, Holly Gladstone, as an "assistant supervisor." Gladstone filled in for Sinke and Kangas when they were absent, and was also responsible for resolving disputes between parents and schools over transportation issues. (A 1477, n.17; A 107, 303, 310.)

Sinke worked out of the same office he had occupied while working for GRPS and Kangas worked in the same cubicle, which had been enlarged. (A 1477; A 64-71, 352.) The same people who had reported to Kangas under GRPS—drivers, route planners, and mechanics—continued to report to her under the new structure. (*Id*.) Employees also continued to call in for Kangas' approval for time off. (A 1477-1478; A 80-83.) Kangas was still involved in compiling all of the hourly routes using basically the same process she had before. (A 77-78.)[7] She and Sinke also remained involved in discipline and made disciplinary recommendations to company officials in Lansing. (A 1478; A 66.)

2. Post-Transition Working Conditions: Bus Drivers

Once the Company took over, the bus drivers it hired—a large majority of whom had been drivers at GRPS—followed the same routes as before for both regular and special education students, with variations based only on changes in school census data. (A 1477; A 77-78, 88-93.) They still parked the buses in the same lot at 900 Union Street and they continued to punch the same timeclock in the same office. (A 1477; A 78-90, 96-98, 102, 153-157.) The drivers also continued to gas up the buses at the same pumps as before, and use the same

[7] Kangas stated (A 1478; A 89-91) that when the Company took over, the drivers were permitted to choose their own routes on the basis of seniority, but that previously, under GRPS, she had assigned the drivers' routes using seniority. As noted above, her role in compiling and organizing the data did not change. (A 77-78, 180.)

building for their drivers' lounge. (*Id*.) The Company required the bus drivers to perform some additional ministerial duties, such as filling out a lengthier pre-trip inspection report, completing an attendance log for students they transported, and keeping track of mileage, that previously they were not required to do. (A 1477; A 163.)

3. Post-Transition Working Conditions: Route Planners

The Company also hired three route planners to start on June 10. (A 1477; A 100-101, 179, 591, 682.) Two of these route planners had been employed in the same capacity by GRPS. (*Id*.) The third had worked for GRPS as a dispatcher. (A 1477; A 95, 352.) Although the route planners became salaried rather than hourly employees when they transitioned to the Company, they continued to perform their same jobs, in the same location, using the same tools, and reporting to the same supervisor, Kangas. (A 1478; A 74, 81, 104.) When the Company first began operations at 900 Union Street, the route planners were not required to punch a timeclock as they had before. However, they resumed punching the clock in approximately mid-2006. (A 1478; A 81.)

4. Post-Transition Working Conditions: Mechanics

To perform maintenance and repair functions in the garage at 900 Union Street, the Company rehired three of GRPS's mechanics and its former lead

mechanic, Virgil Packard. (A 1478; A 102-103.) These mechanics continued to repair the buses as before, in the same garage. (A 1478; A 232-233. 237-238.)

Although they had new inspection reports and other paperwork to complete for the Company, the mechanics utilized the same GRPS computer system for tracking work orders that they previously used. (A 1478; A 232, 244-245.) The mechanics also used the same equipment and many of the same tools, although the Company also provided the mechanics with a tool allowance and required them to wear uniforms with the Company's logo. (A 1478; A 232-233.)

The mechanics, previously supervised exclusively by Sinke or Kangas, began reporting to Pellerito or the Company's assistant director, Andre Sanford, but Kangas and Sinke retained some supervisory authority. (A 1478; A 65, 117, 352.) Pellerito's office was located in Lansing and Sanford's office, which had been at 36th Street, moved to the 900 Union Street location by May 2006. (A 1478; A 241.) The Company also allowed the mechanics to work one full day shift, rather than the day and evening shifts they had worked before the transition. (A 1478; A 95.)

I. Basic Company Policies Applied to the Former GRPS Transportation Department; the DTEU Contract Applied to the Bus Drivers

After taking over the 900 Union Street operations, the Company began applying some corporatewide rules and policies to the former GRPS employees.

(A 1478; A 160-161.) It also began providing annual in-service training to its drivers at the beginning of the school year, and other training, including health and safety training, to all of its employees. (*Id*.)

Because of the change in the collective-bargaining representative, the DTEU grievance procedure covered the drivers. (A 1478; A 612.) Under that procedure, the first step in the grievance process was handled by the immediate supervisor, which in the case of 900 Union Street, was Kangas or Sinke. (*Id*.) Higher steps in the procedure were handled by the Company's labor relations staff based in Lansing. (*Id*.)[8] Because the mechanics and route planners no longer had a collective-bargaining representative, they were no longer covered by the grievance procedure. (*Id*.)

J. The Start of the 2005 School Year: the Company Has A Full Complement of Employees and GRESPA Makes a Bargaining Demand, But the Company Ignores It and Refuses to Recognize GRESPA

By the start of the school year in September, the Company's employment had reached its full complement. (A 1477; A 105-106.) At that time, the Company had a total of 137 drivers transporting students for GRPS and KISD from the 900 Union Street facility. (A 1477; A 106.) Of this number, 100 were previously employed as drivers in the GRESPA unit. (A 1477; A 353, 591, 682.)

[8] Kangas testified that no grievances were filed since the Company took over GRPS's transportation service. (A 1478; A 83.)

On September 1, GRESPA sent a letter to the Company, stating that it was "the recognized exclusive collective bargaining representative of the employees performing transportation services for [GRPS] students that have been hired by Dean Transportation." (A 1477; A 597.) GRESPA then requested that the Company recognize it as the exclusive representative of "the unit employees, including the full and part time bus drivers, dispatchers, mechanics, route planners" and bargain with GRESPA as their representative. (*Id*.) The letter concluded by asking the Company to contact it by September 15 to set up dates to begin negotiations. (*Id*.)

On September 15, the Company responded to this request. (A 1477; A 598.) It disputed GRESPA's claim that it represented the employees in question and refused to recognize GRESPA. (*Id*.) Since June 10, the Company has recognized DTEU, not GRESPA, as the exclusive collective-bargaining agent of bus drivers employed at 900 Union Street, and DTEU has accepted such recognition. (A 1477; A 354.) Also since that date, the Company has applied its existing collective-bargaining agreement to, and deducted union dues from, the drivers employed at 900 Union Street. (*Id*.) The Company has not recognized any union with respect to the route planners, dispatchers, and mechanics. (*Id*.)\

K. Limited Employee Interchange and Interaction Between 900 Union Street Employees and Company Employees at Other Locations

Since the Company took over transportation services for GRPS, there have been three permanent transfers involving 900 Union Street drivers. (A 1480; A 321, 327-329.) Rickina Holibaugh transferred from 36th Street to 900 Union Street on August 25. (A 1480; A 321-322.) Pat Keiser and Vicky Skinner transferred from 900 Union Street to 36th Street on October 21 and January 3, 2006, respectively. (*Id*.) The only mechanic working at 900 Union Street who was not a former GRPS employee is Rich Spaans, who permanently transferred from the Company's Lansing facility shortly after June 10. (A 1480; A 194.)

Temporary interchange was also infrequent. Once, a mechanic from 900 Union Street was temporarily assigned to work as a vacation replacement at the 36th Street garage, and he was also once assigned to install child safety alarms on buses at the Holland facility. (A 1480; A 213-216.) On rare occasions, the Company has sent buses from its 36th Street location to get minor repairs at 900 Union Street. (A 1480; A 962-973.) Also, on two occasions, drivers from 36th Street substituted at 900 Union Street. (A 1480; A 322.)

Interaction between 900 Union Street employees and company employees at other locations has also been limited. Although students from the school districts that make up KISD Regions I, II, and III attend some programs at GRPS schools—

resulting in some company drivers in Region III covering some of the same territory as 900 Union Street—none of GRPS's special education students attend programs operated by other districts. (A 1480; A 87-93.)

At the Lincoln School campus, the only one outside the city limits to which former GRPS drivers go, GRPS operates a number of programs for special education students from all four regions of the KISD. (A 1480; A 93.) While dropping off and picking up students at this location, drivers from 900 Union Street socialize with drivers from the 36th Street location. (A 1480; A 170.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista and Members Liebman and Kirsanow), in agreement with the administrative law judge, found (A 1471-1472) that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to recognize and bargain with GRESPA as the representative of bus drivers, route planners, and mechanics at 900 Union Street. The Board also found (A 1471) that, because the Company was a successor to GRPS and the former GRESPA unit remained appropriate, the Company violated Section 8(a)(1), (2), and (3) of the Act, and DTEU violated Section 8(b)(1)(A) and (2) of the Act, by the Company recognizing and DTEU accepting recognition as representative of the 900 Union Street bus drivers, by the Company and DTEU applying their collective-bargaining agreement to the 900

Union Street bus drivers, and by the Company deducting and DTEU accepting dues and agency fees from these employees.

Additionally, the Board (A 1483) independently found that the Company violated Section 8(a)(1), (2), and (3) of the Act, and DTEU violated Section 8(b)(1)(A) and (2) of the Act, because the bus drivers at 900 Union Street were not properly accreted to the existing DTEU unit and an uncoerced majority of those employees had not designated DTEU as their representative. Finally, the Board found (A 1483) that the Company violated Section 8(a)(1) of the Act by telling the 900 Union Street bus drivers that they were required to become members of DTEU and to sign union checkoff authorizations as a condition of employment.

The Board's Order requires the Company and DTEU to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 1484-1486.) Affirmatively, the Order requires the Company to recognize and bargain with GRESPA, to remit dues deductions, and to post copies of a remedial notice. (A 1485.) The Order affirmatively requires DTEU to relinquish recognition by the Company and, with the Company, to jointly and severally reimburse the employees from whom it accepted dues or agency fees, and to post a remedial notice. (A 1485.)

SUMMARY OF ARGUMENT

Contrary to the hyperbolic claims throughout the Company's and *amici*'s briefs, this case involves a straightforward application of well-settled law to the facts. An employer that takes over a business will be deemed a successor for purposes of the Act so long as there is "substantial continuity" between the new and old enterprises. In determining whether the requisite continuity exists, the Board and the courts focus on the perspective of employees, and this Court has repeatedly held that successorship will not be defeated by administrative and managerial changes if the essential nature of the employees' work remains the same.

In the instant case, where the Company acquired 900 Union Street from GRPS and continued to provide the same basic bus driving, mechanic, and route planning services without interruption, and where employees continued to use the same skills and equipment to drive and plan the bus routes, and repair the buses, for the same students, substantial evidence supports the Board's finding that the Company was a successor to GRPS. Moreover, the Company cannot escape this finding by claiming, contrary to Board precedent, that GRESPA did not make a valid bargaining request.

Neither can the Company avoid its obligation to bargain with GRESPA—the historical representative of the unit at 900 Union Street—by claiming that a

bargaining unit at 900 Union Street is not appropriate and that the only appropriate unit would be a combined one including bus drivers at all of its locations. As this Court has observed, because the Board has long given substantial weight to bargaining history in its unit determinations, an acquired unit will be deemed appropriate even if it is not the unit the Board would have chosen in the first instance. Accordingly, a successor that challenges its obligation to bargain with the representative of an acquired unit bears a heavy burden of showing compelling circumstances that overcome the significance of bargaining history.

The Company fails to meet this burden, and does not avoid having to do so by contending that its failure to acquire all of the facilities in the historical unit obviates its bargaining obligation. The Board's finding that a separate unit at 900 Union Street was appropriate is also fully in accord with its longstanding presumption, properly applied here, that a single-facility unit is appropriate. In short, the Board acted within its broad discretion when it rejected the Company's argument that the historically represented drivers, mechanics, and route planners at 900 Union Street did not constitute an appropriate unit for bargaining. It therefore follows that the Board's remaining findings—that the Company and DTEU improperly applied their contract and deducted and accepted dues from the 900 Union Street employees' paychecks—should be affirmed. Indeed, neither the Company nor DTEU contest that these findings should be upheld as a corollary to

the Board's determination that the Company unlawfully failed to recognize and bargain with GRESPA.

Further, the Board's independent finding that, even without a successorship finding, the Company's recognition and DTEU's acceptance violated the Act because the Company failed to demonstrate the requisite factors to accrete the unit into the DTEU bargaining unit, should also be upheld. The Board reasonably found that the former GRESPA unit retained a separate group identity, and that the two critical accretion factors, common day-to-day supervision and employee interchange, were absent. If the Court determines that there was no successorship but this independent finding remains, the employees would be represented by neither GRESPA nor DTEU.

Finally, substantial evidence supports the Board's finding that the Company coerced employees by telling them they had to join DTEU as a condition of employment.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH GRESPA

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees."[9] As the Board recognized (D&O 10), it is well settled that an employer is a "successor" who must recognize and negotiate with the representative of its predecessor's employees if 1) a majority of its employees, consisting of a substantial and representative complement in an appropriate unit, are former employees of the predecessor, and (2) there is substantial continuity between the two operations. *Van Lear Equipment, Inc*., 336 NLRB 1059, 1063 (2001) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41-43 (1987)).

This Court upholds Board findings involving such issues "unless the Board's [factual] findings are not supported by substantial evidence or . . . the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case."

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[9] An employer's failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1), 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] [statutory] rights." *See Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 207 (D.C. Cir. 2004.)

Community Hospitals of Central California v. NLRB, 335 F.3d 1079, 1082-83 (D.C. Cir. 2003) (applying substantial evidence review test to finding of successorship and failure-to-bargain). *See also United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) ("The court applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo.*"); *see generally* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

Where, as here, a challenge is lodged to the continued viability of an historical unit, the weight afforded to the factors assessed falls exclusively within the Board's domain. Thus, the weight the Board affords to such factors must be upheld on review, unless arbitrary or irrational in light of the Act's policies. *See American Hospital Association v. NLRB*, 499 U.S. 606, 611-13 (1991) (it is within the Board's purview to determine reasons for selecting one unit over another so long as reasons comport with the Act's policies). The Board's determination regarding the extent to which such factors exist is also subject to review under the substantial evidence standard. *See Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 117-18 (D.C. Cir. 1996) (Board's unit determination upheld where subordinate

findings supported by substantial evidence and rationale did not offend Act's policies).

In the instant case, the Board properly found that the Company's undisputed refusal to bargain with GRESPA violated the Act because (1) the Company was a successor employer to GRPS and (2) the bargaining unit represented by GRESPA remained appropriate. As shown below, the Board's findings are reasonable and supported by substantial evidence.

B. The Company Became a Successor Employer to GRPS When it Acquired GRPS's 900 Union Street Facility, Hired a Majority of Its Employees from GRPS's Workforce at 900 Union Street, Operated Substantially the Same Business, and GRESPA Made An Appropriate Demand for Recognition

A new employer is a successor to a former employer "if there is 'substantial continuity' between the enterprises." *Pennsylvania Transformer Tech., Inc. v. NLRB*, 254 F.3d 217, 222 (D.C. Cir. 2001) (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)). When a new employer is a successor, it has an obligation to bargain with the representative of the predecessor's employees "so long as 'the majority of its employees were employed by the predecessor.'" *Id.* at 223 (quoting *Fall River*, 482 U.S. at 41).

To determine whether substantial continuity exists in a given case, the Board examines the "totality of the circumstances," with an "emphasis on the employees' perspective." *Fall River*, 482 U.S. at 43. As this Court has explained, the focus of

the analysis "is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect the members of the relevant bargaining unit." *United Food & Commercial Workers v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985) ("*UFCW*"). *See also Pennsylvania Transformer*, 254 F.3d at 222 ("The essential inquiry is whether operations, as they impinge on union members, remain essentially the same."). The Board will normally assess whether an employer is a successor as of the time a union makes its demand for recognition and bargaining, provided the employer has already hired a substantial and representative complement of employees. *See MSK Corp*., 341 NLRB 43, 44-45 (2004).

Here, the Board properly found (A 1471, n.2, 7, 11) that the Company hired a majority of the Company's employees had worked for GRPS at 900 Union Street and that there was substantial continuity between the enterprises when GRESPA made its demand for recognition. To begin, the Company does not challenge the Board's finding (A 1477) that, as of September 1, the Company had a total of 137 drivers, 100 of whom were previously employed as GRPS drivers in the GRESPA unit. (A 1477; A 353.)

Moreover, there can be little doubt that there was substantial continuity between the Company and GRPS from the perspective of bargaining-unit employees at 900 Union Street at the time GRESPA made its bargaining demand.

The bus drivers continued to report to the same location, drive the same buses, and transport the same group of students to essentially the same schools. They also reported to the same supervisors, Sinke and Kangas, as they had when they worked for GRPS. As the Board found (JA 1481), "[w]hile there may be more paperwork involved in fulfilling assigned tasks, this has not destroyed the continuity in their day-to-day work."

The route planners, too, maintained essentially the same jobs. Although they became salaried employees, they continued to work in the same office, using the same computer software, and reporting to the same supervisor. (JA 1478; A 74, 81, 104.)

The mechanics also maintained essentially the same jobs. They continued to work out of the same garage, use the same equipment and tools, and repair and maintain the same buses. (A 1478; A 232-233, 237-238.) Although they had a change in supervision, with Sanford taking over direct supervision from Sinke, they continued to report to Sinke and Kangas when Sanford was not available. (A 1478; 65, 352.) In addition, Virgil Packard, the head mechanic at 900 Union Street for GRPS, continued in the same role for the Company. (A 1478; A 102-103.) Accordingly, the Board reasonably found (A 1481) that, "[c]ertainly, when viewed from the perspective of the employees, there [was] very little change in their working conditions."

Moreover, as the Board recognized (A 1471, n.2), "[i]t is well established that the Board may find substantial continuity even where, as here, a successor employer has taken over only a discrete portion of the predecessor's bargaining unit" (citing *Van Lear Equipment, Inc*., 336 NLRB 1059, 1063-64 (2001); *Bronx Health Plan*, 326 NLRB 810 (1998), *enforced mem*. 203 F.3d 51 (D.C. Cir. 1999)). *See also Community Hospitals*, 335 F.3d at 1085. Therefore, the Company's takeover of only 900 Union Street, and not the full GRESPA unit at GRPS, does not detract from the Board's successorship finding.[10]

In light of the fundamental similarities between the bus driving, maintenance, and planning services provided by GRPS and, thereafter, by the Company, the Company cannot escape a successorship finding by contending (Br

[10] Accordingly, the Company's reliance (Br 28) on *Atlantic Technical Services*, 202 NLRB 169, 170 (1973), is misplaced. As the Board found (A 1471, n.2), that case does not contradict the well-settled law that successorship occurs even when the employer has taken over a discrete portion of the unit. As the Board explained (A 1471, n.2), the finding in *Atlantic Technical* was based on "peculiar circumstances" consisting of a small company taking over the mail function of the "aviation giant" TWA, and the new unit consisting of only 27 employees out of the nationwide unit of 14,000, 1100 of whom were based at the same facility. Here, in contrast, a large majority of the 168 former GRESPA employees continued working at 900 Union Street after the change in management, and the Board reasonably found (A 1471, n.2) that such numbers do not alter its finding of substantial continuity. Finally, as the Board further found (A 1471, n.2), the GRESPA employees, unlike the employees in *Atlantic Technical*, had "not simply been accreted into the larger GRPS unit, but rather had been part of that larger unit since its initial certification by MERC in 1993."

26-29) that it made changes in GRPS's management structure and altered certain terms and conditions of employment. Indeed, this Court has repeatedly rejected similar arguments. For example, in *Harter Tomato Prods. Co. v. NLRB*, the Court affirmed the Board's finding of substantial continuity despite differences in "wages, benefits, training, customer base, managerial philosophy, and supplier contracts." 133 F.3d 934, 937 (D.C. Cir. 1998). Likewise, in *Pennsylvania Transformer*, the Court discounted "differences in size, facilities, work force, managerial philosophy, [and] customer base," because "the business of both employers is essentially same" and employees continued to "use the same skills and expertise." 254 F.3d at 223-24.

Perhaps the most instructive case is *UFCW*, where this Court held that the Board was *compelled* to find substantial continuity even though the new employer "purged most of the former upper management, made changes to the production process, attracted new customers and lost others, contracted with new suppliers, and down-sized its operation, using only a portion of the former facility." *Pennsylvania Transformer*, 254 F.3d at 224 n.2 (describing *UFCW*).[11] If those changes were not sufficient to defeat successorship in *UFCW*, where there was also an 18-month hiatus in operations and $1.3 million in capital improvements, *id*., it

[11] The Board has since adopted the reasoning of this Court's decision in *UFCW*. *See Sterling Processing Corp.*, 291 NLRB 208, 210 & n.9 (1988).

can hardly be argued that the Company's more limited changes here required the Board to find a lack of continuity.[12] That is especially so given this Court's teaching that an employer's reliance on a laundry list of differences (Br 9-11, 26-27) "is unresponsive to the question we face. We ask not whether [the employer's] view of the facts supports its version of what happened, but whether the Board's interpretation of the facts is reasonably defensible." *Pennsylvania Transformer*, 254 F.3d at 224 (internal quotation marks and citations omitted).[13]

Further, the public-to-private nature of the transaction should not, as the Company contends (Br 27-28), alter the Board's successorship finding. *See Lincoln Park Zoological Society*, 322 NLRB 263, 264-65 (1996), *enforced*, 116 F.3d 216 (7th Cir. 1997). As the Board found (A 1481), under well-settled law, including in this Circuit, the above successorship test is routinely applied in such

[12] The Company is, at best, disingenuous when it cites (Br 11, 27) Kangas's testimony that "everything changed" to buttress its challenge (Br 26) to the Board's finding that the essence of the operation remained the same. When she made that statement, she was referring to what happens to a route when students that make up the route change, not the overall effect of the Company's takeover of 900 Union Street. (A 89-91.)

[13] The Company incorrectly frames (Br 25-29) the relevant question as whether GRESPA appropriately "established majority status." In the instant successorship context, as discussed above, as long as the majority of the new employer's employees worked for the predecessor and substantial continuity in the new employer exists in the eyes of the employees, the requisite "majority interest" is present. *See generally*, *Pennsylvania Transformer*, 254 F.3d at 222.

instances. *See Community Hospitals*, 335 F.3d at 1079, *JMM Operational Services*, 316 NLRB 6 (1995).

The Company (Br 27-28) and some of the *amici* (A. Br 7-15) unsuccessfully attempt to distinguish the well-settled law on this issue by focusing on the right to strike that the former GRESPA employees would acquire under the Act. To begin, the Company did not argue this before the Board.[14] Significantly, however, the argument itself, rather than supporting the Company, actually militates in favor of the Board's application of the successorship doctrine. Contrary to the Company and *amici*'s bare assertions, the acquisition of the right to strike is more likely than not to support former public employees' desire to be unionized under such a scheme. Indeed, the Sixth Circuit, in a Michigan case—like this one—recognized exactly this:

> As the Board notes, the employees were prohibited from striking against an exempt government entity under [the state statute]. However, under the Board's jurisdiction, the employees are permitted to strike, thus strengthening their ability to enforce their bargaining demands. Given that the employees were given authorization to strike, the Board correctly reasons that it is unlikely that the changed circumstances occasioned by the Board's jurisdiction of this matter would cause the employees to abandon union representation.

[14] *See* Section 10(e) of the Act (parties may not raise claim in appeal not made in exceptions before the Board); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Michigan Community Services, Inc. v. NLRB, 309 F.3d 348, 359 (6th Cir. 2002) (extending comity to MERC certification and rejecting employer's argument to the contrary).[15]

Amici's related argument (A. Br 16-28), which boils down to decrying successorship and its attendant obligations to the previous GRESPA unit because school districts need to improve finances and efficiency and reduce bureaucracy, hardly distinguishes the Company from successors to many private institutions. Successorship is not defeated in such cases; nor is there any reason for it to be here. *See, e.g.*, *ATS Acquisitions Corp.*, 321 NLRB 712, 719 (1996) (observing that the successor's plan involved the "consolidation of operations" and the "elimination of job duplication" with the "objective of reducing cost and increasing operating efficiency"); *Hartford Hospital*, 318 NLRB 183, 191 (1995) (observing that the successor's changes "primarily ha[d] to do with achieving economies of scale by eliminating duplicating functions"). *See generally NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 287-88 (1972) ("A potential employer may be willing to take over a moribund business only if he can make changes in

[15] In any event, the speculation to the contrary of pro-employer interest groups justifiably warrants skepticism. *Cf. Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (Board entitled to suspicion and giving employer "a short leash" as "vindicator of its employees' organizational freedom").

corporate structure, composition of the labor force, work location, task assignment, and nature of supervision.").

Nor can *amici* justify departure from well-settled precedent based on their rank speculation that the Board's decision will "increase the costs of outsourcing" (A. Br 16), and, most hyperbolically, "prevent schools from properly fulfilling their primary mission of educating children." (A. Br 21.) This parade of horribles is based entirely on conjecture and, if it is countenanced, would turn labor law—which does not subjugate employee rights to such musings—on its head.

Finally, the Company challenges (Br 29-32) the Board's successorship finding by recycling its last-ditch claim—properly rejected by the Board (A 1472, n.5)—that GRESPA's demand for recognition was ineffective because the unit description referred to "dispatchers" as opposed to "dispatchers/route planners." The Company provides no basis to overturn the Board's reasoned analysis (A 1472, n.5, 1483) that in the successorship context, unlike in the initial organizing cases the Company relies on (Br 29-32), the Board does "not expect perfect precision from a union bargaining demand."[16] Nor has the Company impugned

[16] The Company's claim (Br 31, n.13), that this distinction is without import because GRESPA made its September 1 demand weeks after the Company had begun its operations at the new site, misses the mark. This argument ignores the Board's finding (A 1477) that prior to GRESPA's demand at the start of the regular school year, the Company had only been operating on its smaller, summer scale.

(Br 29) the Board's finding (A 1472, n.5) that, in any event, "the appropriate unit was set forth in the complaint . . . and [the Company] has still refused to recognize GRESPA."

In sum, substantial evidence supports the Board's finding (A 1471, 1481) that the Company was a successor to GRPS because a majority of its employees in the transportation department at 900 Union Street had worked for GRPS and the Company continued operating it in substantially the same way at the time GRESPA made its bargaining demand.

C. The Board Acted Within Its Broad Discretion When It Determined that a Bargaining Unit of Historically-Represented, Former GRPS Bus Drivers, Route Planners, and Mechanics Constituted an Appropriate, Single-Facility Unit

The Board has broad discretion in the selection of bargaining units, and it is well established that the Board "need only select *an* appropriate unit, not *the most* appropriate unit." *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 237 (D.C. Cir. 1996) (internal quotation marks omitted). Moreover, in the successorship context, where "the Board has long given substantial weight to prior bargaining history," an acquired unit remains appropriate even if it is not the unit the Board itself would have chosen in the first instance. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996). Although a successor can attempt to demonstrate that "'compelling circumstances' are present that 'overcome the significance of bargaining history,'" the Board places a "heavy evidentiary burden on a party

attempting to show that historical units are no longer appropriate." *Id*. (quoting *Children's Hospital*, 312 NLRB 920, 929 (1993), *enforced sub nom., California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996)).

Moreover, a bargaining unit limited to a single facility is presumptively appropriate. *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, at 1084-85. As the Board recognized (A 1481), this presumption is "particularly strong where the employees in question had historically been recognized in a single-location unit." Thus, the combination of these two presumptions places a heavy burden on the party challenging them. *Id*. To determine whether an employer has met its heavy burden of rebutting these presumptions and overturning a Board unit determination, the factors reviewed are "geographic proximity, employee interchange and transfer, functional integration, administrative centralization, common supervision, and bargaining history." *Id*.

As shown below, the Board reasonably found (A 1471) that a bargaining unit consisting of former GRPS employees who were drivers, route planners, and mechanics at 900 Union Street was "an appropriate unit." *See Trident Seafoods*, 101 F.3d at 118 (appropriate unless high standards met of unit "repugnant to Board policy" or "hampering employees"). Moreover, the Company's challenges to the Board's determination do not withstand scrutiny.

1. The Board Reasonably Determined that the Historic GRESPA Unit Remained Appropriate

The Board properly applied the above presumptions and the remaining factors in its unit appropriateness determination. To begin, the drivers, route planners, and mechanics working together at 900 Union Street had been part of a MERC-certified unit since GRESPA's 1993 certification. (A 1474; A 348-456.) Accordingly, the Board appropriately attached significant weight (A 1471, n.2, 1481, 1482) to this bargaining history when assessing the unit's appropriateness. *See Trident Seafoods*, 101 F.3d at 118.[17]

In the circumstances here, the Board appropriately applied the single-facility presumption. As shown above, 900 Union Street stands alone and encompasses the unit of employees at issue, all of whom work and take breaks on the same premises in close proximity to each other. Moreover, directly contrary to the Company's insistence otherwise (Br 36-38), this Court has squarely held that the single-facility presumption applies in circumstances identical to those herein: when the prior unit was a subset of the original bargaining unit, and even where the

[17] The Company (Br 39-40) attempts to shift the focus from the bargaining history of the GRESPA-represented employees to the history of the Company's and DTEU's represented employees, arguing that the Board did not properly consider the bargaining history between the Company and DTEU. However, the Company cites no support for the notion that such history, which the Board recognized (A 1479; 1481), trumps the well-established history that the 900 Union Street employees shared under GRESPA.

original bargaining unit included employees in other facilities. *See Community Hospitals*, 335 F.3d 1079 at 1085. In language that could have been written for this case, this Court rejected the identical contention of the employer in that case, and refused to "distinguish between a previously recognized bargaining unit and a subset of such a bargaining unit, limiting the presumption of appropriateness to the former." *Id.*[18]

As the Board also found (A 1481-1482), the remaining relevant factors bolster its unit appropriateness determination. In day-to-day operations, the drivers and other employees report to Sinke and Kangas, who are site-specific supervisors. (A 1476; A 65, 352.) For example, Sinke and Kangas have the authority to determine the proper routes within GRPS and KISD, and Kangas assigns the routes to the drivers and authorizes changes if necessary. (A 77-78.) Kangas and Sinke are also still involved in discipline and Kangas is also responsible for ensuring that all runs are covered. (A 1478; A 66, 77-78.)[19]

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[18] In the face of this strong precedent, the Company is left to weakly protest (Br 37, n.15) that it is distinguishable because in that case, there was "no authority" for the employer's contrary position. However, the same is true in the instant matter—none of the cases cited by the Company (Br 36-37) provide grounds to overturn this Court's precedent.

[19] The Company's claim (Br 42-43) that site supervisors Sinke and Kangas do not exercise enough local autonomy to justify treating the 900 Union Street employees as a separate unit ignores the strong record evidence to the contrary, as discussed above, including that the Company stipulated that Kangas and Sinke were supervisors at 900 Union Street. (A 352.) Moreover, Kangas continued to be

The evidence also amply demonstrates that the drivers, route planners, and mechanics have otherwise maintained a separate identity from similar employees at the Company's other facilities. As discussed above, the GRPS contract secured special provisions for the 900 Union Street location. The drivers at each of the other Company facilities are treated as separate groups for job assignment and bidding purposes. (A 1475, 1482; 329-330, 617.) Indeed, even when a driver transfers from one location to another, he goes to the bottom of the seniority list *at that location*. (*Id*.) In addition, as noted above (pp. 27-28,) the degree of interchange between Union Street and the other facilities was minimal and occurred primarily among the drivers.

The separate identity of 900 Union Street is also demonstrated, as the Board noted (A 1471, n.4, 1482, 1482 n.30), by its status as the only company facility with a substantial component of regular education drivers, who do not posses the same degree of skill, nor require the same training, as special education drivers. Finally, the Board properly considered (A 1482) that the mechanics have much more frequent interaction with drivers and route planners than they do with employees at the other DTEU-represented facilities and share some daily

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involved in route planning and discipline. (A 1478; A 66, 77-78.) It also fails because it primarily relies on inapposite cases which neither involve successorship nor contain the strong bargaining history present herein (see cases cited at Br 43-46, except for *Dattco*, which is discussed further, below).

supervision with them, thus supporting the treatment of 900 Union Street as a single bargaining unit.[20]

2. The Company's remaining challenges are without merit

The Company's remaining challenges—that a "systemwide," rather than a single-facility, presumption should apply (Br 32-36), and, that even if the single-facility presumption does apply, it has overcome it (Br 38-49)—fail to withstand scrutiny under the facts and applicable law.[21]

First, the Company's advocacy for a systemwide unit (Br 32-36) is merely an awkward attempt to stretch one area of Board law—unit determinations involving public utilities and their sole source of providers—to wholly different circumstances. Unlike the public utilities context, the Company's bus transportation of the public school students is not the sole source of this service. Indeed, Region I and II of the KISD have separate transportation contracts and the

[20] The Company fails to cite (Br 46-49) precedent mandating that the mechanics and drivers be placed in separate units. Instead, it unpersuasively relies (see cases at Br 46-49) on initial bargaining cases, unlike the instant successorship case, in which separate mechanic units were found to be an—but not the only—appropriate unit.

[21] As discussed below in Section III at p. 54, the Board also reasonably found (A 1482), contrary to the Company's claim (Br 49-51), that the GRESPA unit did not lawfully "accrete" to DTEU. To the extent the Company contends (Br 49-51) that this purported accretion also counters the Board's unit determination, the discussion in Section III, demonstrating why there was no accretion, forecloses such an argument.

Company does not have a monopoly of school buses in Michigan. Accordingly, there is no basis to ignore well-settled Board law applying the traditional single-facility presumption to the privatization of school bus transportation. *See e.g., Van Lear*, 336 NLRB 1059 (applying single-facility presumption to privatization of school bus transportation).

In any event, it is highly questionable whether the Company properly raised the "systemwide" argument before this Court. Contrary to the Company's claim (Br 20), it did not raise this argument in its exceptions before the Board, as required for this Court to review the argument on appeal. *See* Section 10(e) of the Act. Instead, the Company belatedly raised this argument for the first time in its Reply Brief to the Charging Party's Answering Brief to the Company's Exceptions. (Rep Br at 8.) Board regulations prohibit raising such *sua sponte* arguments in a reply brief. 29 U.S.C. Sec.102.46(h) (reply brief to answering brief exceptions "shall be limited to matters raised in the brief to which it is replying").[22]

[22] Moreover, in its Reply Brief (Rep Br at 8), the Company falsely attempted to justify its late argument by claiming that the primary case it relies on, *Alyeska Pipeline Service Co.*, 348 NLRB No. 44 (2006), "was decided shortly after [the Company] filed its Exceptions." To the contrary, the Board decided *Alyeska* on September 29, 2006, before the Company filed its Exceptions and Exceptions Brief on October 25, 2006.

The Company is no more successful in challenging the single-facility presumption on its merits. As noted above in notes 19 and 20, a majority of the cases the Company relies upon (Br 38-46) to claim that it has rebutted the presumption are missing key similarities to the instant case: successorship or strong bargaining histories in the predecessor unit.

As for the only successorship case the Company relies upon for this argument (Br 38, 43)—*Dattco, Inc.*, 338 NLRB 49 (2002)—the Company fails to overcome the Board's reasoned distinction (A 1471, n.3) between that case and this one. In *Dattco*, as the Board noted (A 1471, n.3), "fully one-third of the bus drivers were shuttled from their home facilities to other terminals on a daily basis, and were supervised by managers at the other facilities." In contrast, the drivers "work exclusively out of their home facility, where their routes and runs are determined, and where they are supervised by the local managers."

Therefore, the Company is flat wrong in contending throughout its brief (Br 32, 42, 43-45) that the Board's decision is inconsistent with prior cases. Indeed, it cites no authority for the proposition that the Board was unreasonable in assessing the factors in this case, which is the standard necessary to overturn the Board's decision. See *NLRB v. Heartshare Human Servs.*, 108 F.3d 467, 472 (2d Cir. 1997) ("a strong showing on just a few of the factors may suffice to sustain the Board's decision, which is entitled to considerable deference"). Accordingly,

when determining whether the single-facility presumption has been overcome, the Board and the courts have routinely found factors favoring multifacility units to be outweighed by factors favoring single-facility units. *See, e.g., Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 452-57 (2d Cir. 1994); *RB Assocs., Inc.*, 324 NLRB 874, 875-78 (1997); *Gerry Homes*, 324 NLRB 447, 450 (1997), *enforced mem.*, 159 F.3d 1346 (2d Cir. 1998); *Fisher Broadcasting, Inc.*, 324 NLRB 256, 259, 62-63 (1997). The Board acted well within its broad discretion in reaching the same conclusion here.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1), (2), AND (3) OF THE ACT AND DTEU VIOLATED SECTION 8(b)(1)(A) AND (2) OF THE ACT BY THE COMPANY RECOGNIZING AND DTEU ACCEPTING RECOGNITION OF THE 900 UNION STREET DRIVERS; BY THE COMPANY AND DTEU APPLYING THEIR AGREEMENT TO THE UNION STREET BUS DRIVERS; AND BY THE COMPANY DEDUCTING AND DTEU ACCEPTING DUES AND AGENCY FEES FROM THESE EMPLOYEES

The Company and DTEU do not contest that if the Board was correct in the above-discussed determination that GRESPA remained the proper representative of the 900 Union Street employees, then the Board's findings (A 1483)— that the Company committed violations of Section 8(1), (2) and (3) of the Act, and that DTEU committed related violations of Section 8(b)(1)(A) and (2) of the Act— should be affirmed.

Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) makes it an unfair labor practice for an employer to recognize and enter a collective-bargaining agreement with a union that has not been selected by a majority of the employees in the bargaining unit, regardless of whether the employer believes in good faith that the union has majority support. *Int'l Ladies' Garment Workers' Union v. NLRB,* 366 U.S. 731, 739 (1961) ("The act made unlawful by § 8(a)(2) is employer support of a minority union . . . . [P]rohibited conduct cannot be excused by a showing of good faith."). When an employer and a minority union include a union security clause in their contract, the employer violates Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)). *Int'l Union of Petroleum & Indus. Workers v. NLRB,* 980 F.2d 774, 778 (D.C. Cir. 1992).

As shown above, the employees at 900 Union Street were already represented by GRESPA for purposes of collective bargaining. It follows, then, that the Company's recognition of DTEU as the bus drivers' bargaining representative, and its application of its collective-bargaining agreement with DTEU to the bus drivers at 900 Union Street, including deducting dues payment and remitting them to DTEU, violated Section 8(a)(1), (2), and (3) of the Act. *See NLRB v. Katz's Delicatessen,* 80 F.3d 755, 767 (2d Cir. 1996); *see also Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1270 (2005), *enf'd* 181 Fed. Appx.

85 (2d Cir. 2006) (imposition of union and deducting of dues violates Section 8(a)(1),(2), and (3) of the Act).

Similarly, a union violates Section 8(b)(1)(A) of the Act by accepting recognition and agreeing to apply the terms of its collective-bargaining agreement to a unit of employees without the support of a majority of those employees. *Frontier Telephone*, 344 NLRB at 1270, *enforced* 181 Fed. Appx. 85 (2d Cir. 2006); *see also NLRB v. Windsor Castle Health Care Facilities, Inc*., 13 F.3d 619, 622 (2d Cir. 1994). Moreover, where, as here, an employer and such a minority union include a union security provision in their contract, the union also violates Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)). Accordingly, the Board properly found (A 1483) that, because the 900 Union Street employees were already represented for collective-bargaining purposes by GRESPA, DTEU's actions violated these provisions.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S INDEPENDENT FINDING THAT THE COMPANY AND DTEU VIOLATED THE ACT BY RECOGNIZING DTEU AND APPLYING THEIR AGREEMENT, INCLUDING DUES DEDUCTION, TO THE 900 UNION STREET BUS DRIVERS, BECAUSE THE BUS DRIVERS WERE NOT PROPERLY ACCRETED

Even if this Court holds that the Company was not a successor to GRPS, the Board properly found (A 1483) that the Company and DTEU, in any event, respectively violated Section 8(a)(1), (2), and (3) of the Act, and Section

8(b)(1)(A) and (2) of the Act, because the drivers at 900 Union Street were not properly accreted to the existing DTEU unit. Absent such accretion, the Company was not allowed to recognize DTEU as the representative of the former GRPS employees, regardless of whether GRESPA still represented those employees.[23] As we now show, the Board properly found that the Company failed (Br 49-51) to meet its heavy burden of establishing such an accretion.

Accretion is the addition of a group of unrepresented employees to an existing union-represented bargaining unit without a Board election. The Board has long recognized that such addition is permissible. *See Lone Star Producing Co.,* 85 NLRB 1137, 1142 (1949). However, accretion is disfavored, because it deprives the accreted employees of the opportunity to select or reject their bargaining representative. *New York Rehabilitation Case Management, LLC v. NLRB,* 506 F.3d 1070, 1076-77 (D.C. Cir. 2007); s*ee also Westinghouse Electric Corp. v. NLRB,* 440 F.2d 7, 11 (2d Cir. 1971); *Frontier Telephone,* 344 NLRB at 1271, *enforced* 181 Fed. Appx. 85 (2d Cir. 2006).

Employees may not be treated as an accretion to an existing unit when they would constitute a separate appropriate unit. *See Melbet Jewelry Co.,* 180 NLRB

[23] If the Court upholds the Board's determination that the unit did not accrete to DTEU, then it should uphold these corollary findings because neither the Company nor DTEU challenge them.

107, 110 (1969); *Service Employees Local 144 v. NLRB*, 9 F.3d 218, 223 (2d Cir. 1993). Therefore, the Board permits accretion "only where the employees sought to be added to an existing bargaining unit have little or no separate group identity and share an overwhelming community of interest with the preexisting unit to which they are accreted . . . ." *E.I. Dupont*, 341 NLRB 607, 608 (2004); *see also Safeway Stores, Inc.*, 256 NLRB 918, 918 (1981). The party seeking accretion has the burden of proving its propriety. *See Brown Transport Corp.*, 296 NLRB 552, 562 (1989).

As the Board recognized here (A 1482), the factors considered when determining whether a group of employees has accreted to an existing unit include integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange. *See Teamsters National United Parcel Service Negotiating Committee v. NLRB*, 17 F.3d 1518, 1520 (D.C. Cir. 1994). The two most important factors cited by the Board, identified as "critical" to a finding of accretion, are common day-to-day supervision and employee interchange. *E.I. Dupont*, 341 NLRB at 608; *Accord Frontier Telephone*, 344 NLRB at 1271, *enforced* 181 Fed. Appx. 85 (2d Cir. 2006).

After carefully considering the relevant factors, the Board reasonably concluded (A 1482) that the two "critical" accretion factors are absent in the instant case. First, the overwhelming evidence in the record, discussed above (p. 47-48), establishes that the drivers at 900 Union Street do not share common day-to-day supervision with the Company's drivers at its other facilities. The former GRESPA drivers continue to report on a daily basis to Sinke and Kangas at 900 Union Street. (A 1482; A 65.) While Sinke and Kangas may have to report to Witteveen and others in the Company's management hierarchy, the individuals who determine the drivers' daily routine are unique to them. (A 1482; A 65, 77-78.) Indeed, the Board correctly noted (A 1482) that "there is no evidence that Sinke or Kangas have any daily supervisory authority over the drivers at the Company's other facilities and no evidence that the site supervisors from these other facilities have any authority over the drivers at 900 Union Street."[24]

In addition, the Board correctly found on this record that there is very little evidence of the kind of employee interchange that would support a finding of accretion. As the Board noted in *Frontier Telephone*, temporary interchange is more important than permanent interchange because it shows the degree to which there has been a merger of the two groups of employees. 344 NLRB at 1272,

[24] The Company's assertion (Br 50, n.19) that the Board erred in its assessment of the common supervision factor again ignores that Kingas and Sinke retain daily supervisory authority over 900 Union Street. (A 65-66, 70, 83, 150, 352.)

enforced 181 Fed. Appx. 85 (2d Cir. 2006). There is virtually no temporary interchange of drivers here, other than a mere two instances when a driver from 36th Street substituted for a driver at 900 Union Street. (A 1482; A 322.) The Board also properly noted (A 1482) that the three instances of permanent interchange were not significant.[25]

In addition to the absence of these two critical factors, the Board also properly found (A 1482) that the other factors strongly support a finding that there has been no accretion. As noted (p. 48), the different skills and functions of the non-special education drivers at 900 Union Street distinguish them from the special education drivers at the Company's other facilities. Moreover, because of their shared bargaining history, the drivers at 900 Union Street have more of a community of interest with the route planners and mechanics at that facility than with the bus drivers at the Company's other facilities.

Finally, contrary to the Company's implication (Br 14, 50), the Board correctly (A 1482) attached little weight to the evidence that drivers from 900

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[25] The Company fails (Br 50, n.19) to provide grounds for overturning the Board's reasonable conclusion that these transfers do not rise to the level necessary to warrant accretion. *Cf. Novato Disposal Services, Inc*., 330 NLRB 632, 632 (2000) (permanent transfer of four employees and temporary transfer of two in unit of 101 held insignificant). Nor does its citation (Br 50, n.19) to *Prince Telecom's* reliance on "some fluidity" bolster its position; in that case, there was not just "some fluidity," but significant evidence of temporary transfers, to the tune of 26 temporary transfers out of 148 employees. *Prince Telecom*, 347 NLRB No. 73, 2006 WL 2206832 (2006) at *7.

Union Street have the opportunity to interact socially with drivers from the 36th Street location while dropping off and picking up students at the Lincoln School campus. As the Board noted (A 1482 n.31): "[T]his interaction is no different than the interaction the GRPS/KISD drivers had before the change in employer and the interaction they continue to have with KISD Region I and II drivers who are represented by a different union and also make stops at Lincoln School. It certainly does not demonstrate that the 900 Union Street drivers have lost their separate identity."

At bottom, the Company is no more successful in arguing that the Board should have differently weighed the factors regarding accretion than it was in arguing that the Board should have differently weighed the other factors regarding unit appropriateness. Such arguments are woefully insufficient to establish that the drivers at 900 Union Street lost their separate identity or that they have an "overwhelming community of interest" with drivers at its other facilities.

Accordingly, as the Board found (A 1471, 1483), the 900 Union Street drivers did not accrete to the DTEU unit and there is no evidence that an uncoerced majority of them had designated DTEU to be their representative. To the contrary, the Company told the Union Street drivers that they had to join DTEU as a

condition of their employment.[26] Therefore, the Company's and DTEU's application of their agreement to the drivers, and the deduction and acceptance of dues, respectively violated Section 8(a)(2) and (3), and 8(b)(1)(A) and (2) of the Act, independent of the successorship finding.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY TELLING UNION STREET BUS DRIVERS THAT THEY WERE REQUIRED TO BECOME MEMBERS OF DTEU AND TO SIGN UNION CHECKOFF AUTHORIZATIONS AS A CONDITION OF EMPLOYMENT

An employer violates Section 8(a)(1) of the Act by prematurely telling employees that they are required to join a preferred union as a condition of employment. *Mar-Jam Supply Co.*, 337 NLRB 337, 350 (2001); *Acme Tile & Terrazo Co.*, 318 NLRB 425, 427–28 (1995). The record amply supports, and the Company does not dispute, the Board's credibility-based finding (A 1476, 1483) that President Dean and Regional Manager Witteveen told prospective bus driver employees, in April and in early June 2005, that they were required to become

[26] The Company's suggestion (Br 49-50) that the DTEU contract "requires" the accretion of the former GRESPA unit ignores well-settled case law that, to the contrary, such provisions merely obviate the need for an election in a new unit if, unlike here, there is evidence of uncoerced majority support for the new representative. *See Save-It Discount Foods*, 263 NLRB No. 97, 695 (1982).

members of DTEU and to sign dues-checkoff authorizations as a condition of employment. (A 55, 148, 149.)

The Company does not dispute that if this Court upholds the Board's above-discussed findings that the Company's recognition of DTEU was unlawful, the Company's statements violated Section 8(a)(1). Accordingly, this finding should be upheld.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter judgment denying the petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

July 24, 2008

ADDENDUM

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. Section 151, et. seq., and the Federal Regulations ("C.F.R."), are excerpted below:

Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158):

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from

permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate

against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 10 of the Act (29 U.S.C. § 160):

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

Regulations:

29 C.F.R. § 102.46 (h):

§ 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments

(h) Within 14 days from the last date on which an answering brief may be filed pursuant to paragraph (d) or (f) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this subsection shall be limited to matters raised in the brief to which it is replying. . .

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEAN TRANSPORTATION, INC.	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 07-1262, 07-1313, 07-1314
	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	07-CA-49003 & 07-CB-15014
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
GRAND RAPIDS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION	*	
	*	
Intervenor	*	
	*	
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	
v.	*	
	*	
DEAN TRANSPORTATION EMPLOYEES UNION	*	
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,650 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 24th day of July, 2008

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	*
v.	*
	*
DEAN TRANSPORTATION EMPLOYEES UNION	*
	*
	*
Respondent	*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by hand delivery the required number of copies of the Board's

final brief in the above-captioned case, and has served two copies of the final brief by first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC
this 24th day of July, 2008